STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

LORINDA IRENE SWAIN,
Defendant-Appellant.

Supreme Court No. 150994
Court of Appeals No. 314564
Lower Court No. 2001-004547-FC

DEFENDANT-APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

The prosecution's Response in Opposition to Leave to Appeal regurgitates the flawed reasoning of the Court of Appeals and ignores Ms. Swain's arguments upon which leave to appeal is sought. First, the state ignores that the Court of Appeals adopts a strained interpretation of MCR 6.502(G)(2) that ignores the text, structure, and purpose of the court rule. Second, the Court of Appeals's definition of the *Brady* evidence is unsupported by precedent or common sense.

Moreover, it is telling that the prosecution's counter-statement of facts does not address any of the significant factual developments in this case since trial, including the evidentiary hearing at issue. This is because every development in this case over the past 10 years indicates there is a significant possibility of Ms. Swain's innocence. Judge Sindt has "no doubt about it." Trial Court Opinion at 7; App. B to the Application for Leave to Appeal. The law requires significant deference to this finding and the others forming the basis of his decision to reverse Ms. Swain's conviction.

Despite its avowed commitment to finality, the prosecution has **three times** appealed trial Judge Conrad Sindt's decisions in favor of Ms. Swain. Though the prosecution argues finality will be served by allowing the erroneous decision from the Court of Appeals to stand, the opposite is true. This case has the potential to clarify a fundamental misunderstanding of Michigan law and therefore prevent an otherwise inevitable flood of future litigation. This Court should either grant the application for leave to appeal or summarily reverse the Court of Appeals's decision and remand this case for a new trial.

REPLY TO PROSECUTION'S STATEMENT OF FACTS

Ms. Swain's Leave Application contains a detailed statement of facts, but she responds here specifically to several significant inaccuracies and omissions in the prosecution's response.

First, the prosecution continues to misstate the record regarding the interview of Ms. Swain by Detective Picketts. Picketts testified that when he told Ms. Swain she was a suspect, that the complaint was about oral sex, and the complainant was Ronnie, Ms. Swain retorted with a denial of the allegations, stating "I never sucked my kid's dick." Trial Tr. Aug. 14, 2002, Vol. III, 46-47. The prosecution has consistently, and inaccurately, claimed that she made this statement *before* she was informed of the full nature of the accusation or who the alleged victim was. Response in Opposition at 7. More importantly, it successfully misled the Court of Appeals to the same conclusion. Court of Appeals Opinion at 8; App. A to the Application for Leave to Appeal.

The record makes clear that prosecution's description of the interview is simply not true. As Detective Picketts testified:

> Initially I told her that there had been a complaint at this time [sic] had been lodged and she was a suspect in a criminal sexual conduct complaint; that the complaint had been lodged by Ronal and Linda Swain, and **I told her that the victim was one Ronald Swain, her son . . . Once I started to say the complaint involved oral sex,** she immediately became rather vocal and animated, and made a statement in regard to that.

Trial Tr. Aug. 14, 2002, Vol. III, 46-47. (Emphasis added).[1] At the point Ms. Swain proclaimed her innocence, she had been told she was a suspect in a criminal sexual conduct complaint, that the complainant was her son, and that the allegation involved oral sex.

Second, the prosecution asserts Ms. Swain failed a polygraph. Response at 9. Not only is this unsupported by anything in the record, but in fact Ms. Swain passed a polygraph in 2003. See Polygraph Exam Report, Ex. 2 to 2005 Motion for New Trial; Appendix L.

[1] Further proof that the prosecution grossly misstated the record comes from Detective Picketts's September 7, 2001, police report: "**R/D advised Lorinda Swain that the victim was one Ronald Swain. When she inquired as to what type of sex complaint, R/D started to say it involved oral sex**, and at that point in time Lorinda Swain became extremely excited and animated and yelled at the R/D, and her statement was 'I never sucked my kid's dick.' " Report of Detective Picketts #0006676.01C (Sept. 7, 2001) at 5 (emphasis added); Appendix C to the Application for Leave to Appeal.

Third, the prosecution has ignored every development in this case since the conclusion of the trial in 2002. As detailed in the Statement of Facts in Ms. Swain's Leave Application, both Ronnie and Cody Swain have repeatedly recanted their testimony in every possible forum, including under oath as adults at the December 20, 2011 evidentiary hearing. Ronnie, who is now 27 years old, again recanted as recently as February of this year in a TV interview.[2]

Finally, the prosecution has ignored the fact that Deborah Charles, the serial jailhouse snitch whose testimony is the only remaining evidence of guilt, has since been thoroughly discredited. There is widespread agreement that she is a habitual liar; Charles has been convicted of uttering and publishing 19 times, and state investigators have concluded that she is not to be trusted. See Select Documents Pertaining to Deborah Charles; Appendix M.

ARGUMENT

I. The Prosecution Has Not Responded to Ms. Swain's Argument Regarding the Proper Application of *Cress* to MCR 6.502(G)(2) Other than to Baldly and Without Citation Assert that it is Wrong: This Court's Intervention is Necessary to Clarify the Issue.

The prosecution's response to Ms. Swain's contention that the four-prong test set out in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003) should not be applied to MCR 6.502(G)(2) claims demonstrates exactly why this Court's guidance on the issue is needed. Not only does the prosecution fail to rebut any of Ms. Swain's substantive arguments, it also provides a perfect example of the misunderstanding that has emerged over the interpretation of the rules for subsequent 6.500 motions.

The prosecution misstates the second exception to the bar on subsequent motions. While the text of MCR 6.502(G)(2) provides an exception for "new evidence that was not discovered

[2] WoodTV.com, *Swain's Son Hopes State Supreme Court Hears Case* <http://woodtv.com/2015/02/11/swains-son-hopes-state-supreme-court-hears-case/> (accessed March 12, 2015)

before the first such motion," the prosecution erroneously states the exception as one requiring "newly discovered evidence" as defined by the *Cress* standard. Response at 12. Relying on this misstatement, it then argues that the "Court of Appeals did not clearly err in looking to [the Supreme] Court's precedent for determining what constitutes newly discovered evidence." *Id* at 14. This argument, however, is based on the flawed premise that Ms. Swain was required to present "newly discovered evidence" that satisfies the *Cress* test at all. However, under the only reasonable reading of MCR 6.502(G)(2), she is not, and therefore *Cress* is inapplicable.[3]

The prosecution asserts that Ms. Swain has not cited any authority for the proposition that the *Cress* newly discovered evidence test does not apply to claims brought under the new evidence exception of MCR 6.502(G)(2). Response at 13. It concludes, therefore, that she has abandoned the argument. *Id* at 14. This is plainly wrong. In support of her argument that the text of the rule forecloses the Court of Appeals's interpretation, Ms. Swain relies on precedent from this Court directing the lower courts to adhere to the plain language of a statute or court rule with **no further judicial construction**. See *Gladych v New Family Homes*, 468 Mich 594, 597; 664 NW2d 705 (2003). She cites additional authority requiring courts to construe the rule so as to harmonize the meaning of Subchapter 6.500 and the Court Rules as a whole. See *Houston v Governor*, 491 Mich 876, 878; 810 NW2d 255 (2012). Finally, Ms. Swain points out that the Court of Appeals's interpretation explicitly adds a diligence requirement to *Brady* claims, directly violating this Court's recent ruling in *People v Chenault*, 495 Mich 142; 845 NW2d 731 (2014).

[3] The prosecution also implies that the evidence at issue, which it characterizes as Dennis Book's knowledge, Response at 13, is not new even under the correct interpretation of MCR 6.502(G)(2). As Ms. Swain argues in her Leave Application and in Part II here, this characterization is incorrect. Using the correct characterization of the evidence — that the exculpatory phone call between Book and Detective Picketts occurred — Ms. Swain indisputably satisfies the requirement that the evidence "was not discovered" before the first 6.500 motion. See Trial Court Opinion at 5; App. B.

Because precedent requires adherence to the plain language of MCR 6.502(G)(2) and rejects any further judicial construction of its requirements, the lack of authority on this specific issue supports Ms. Swain's interpretation. **It is actually the prosecution that fails to cite any authority for its own preferred interpretation**. The conflation of the "new evidence" procedural gateway requirement of MCR 6.502(G)(2) and the requirements of a substantive "newly discovered evidence" *Cress* claim is a baseless innovation by the Court of Appeals and the prosecution that is unsupported by any logical reading of the court rules or relevant precedent.

The complete lack of authority on this issue is precisely the reason this Court should grant leave to appeal. Alternatively, this Court should summarily reverse the decision of the Court of Appeals and remand the case for a new trial.

II. The Prosecution Fails to Respond to Ms. Swain's Argument that the Court of Appeals's Reasoning Contradicts the *Brady* Case Itself and Instead Opts to Mischaracterize Both the Record as Well as Binding Precedent.

The prosecution did not respond to Ms. Swain's argument that the Court of Appeals's application of *Brady* would deem *Brady* itself to be wrongly decided, and therefore cannot be the correct interpretation. In *Brady*, the defendant knew the essential facts of an accomplice's potential testimony because the defendant was also present at the scene of the crime. But in *Brady*, despite defendant's knowledge, the court correctly found the prosecution's failure to disclose the accomplice's confession to be "a violation of the Due Process Clause." *Brady v Maryland*, 373 US 83, 86; 83 S Ct 1194; 10 L Ed 2d 215 (1963). **Here, as in *Brady*, the evidence at issue is not Book's personal knowledge, but rather the information that the government had and the defendant did not — the phone call in which Book told police Ms. Swain was innocent.**

Rather than offer an explanation of how the Court of Appeals's definition can be

reconciled with *Brady*, the prosecution opts to contest the factual findings of the trial court by arguing the phone interview never occurred. But those findings were certainly within the range of principled outcomes and deserve significant deference. Based on credibility determinations made after extensive questioning by the Judge himself, Judge Sindt determined that the phone call had occurred.[4] Trial Court Opinion at 4; App. B. Significantly, even though it reversed Judge Sindt's decision, the Court of Appeals did not disturb his factual finding that the phone call occurred. Court of Appeals Opinion at; App. A.

In addition to its attempts to revisit this settled factual question, the prosecution also applies irrelevant case law. The prosecution analogizes to *Spirko* and *Benge*, stating that here, as in those cases, Ms. Swain was "aware of the essential facts necessary" for Ms. Swain to obtain the evidence. Response at 16 (quoting *Spirko v Mitchell*, 368 F3d 603, 611 (CA 6 2004) and citing *Benge v Johnson*, 474 F3d 236, 244 (CA 6 2007)). But *Spirko* and *Benge* were severely limited by the Sixth Circuit's holding in *United States v Tavera*, 719 F3d 705 (CA 6 2013). Indeed, this Court itself cited *Tavera* in *Chenault*, which explicitly rejected the reasoning of cases like the ones the prosecution cites. *People v Chenault*, 495 Mich 142, 155 n.6; 845 NW2d 731 (2014). While *Spirko* and *Benge* have questionable relevance to any issues in this case, *Chenault* is directly on point and clearly binding on the Court of Appeals.

Even if these cases did apply, Ms. Swain has still established a *Brady* claim. In *Spirko*, the court noted that memoranda summarizing exculpatory interviews had been disclosed to the

[4] Contrary to the prosecution's contention, Judge Sindt did not make his finding on the basis of Book's testimony alone. He also evaluated the prosecution's own witnesses, who indicated that the phone call could not have occurred because Det. Picketts did not do phone interviews. However, Ms. Swain presented rebuttal evidence from Det. Picketts's own deposition in a prior case showing that he did conduct phone interviews, and sometimes failed to preserve notes. The prosecution conveniently neglects to mention this important fact, which just so happens to completely undermine the credibility of its own witnesses at the evidentiary hearing. See Leave Application at 13–14 for full discussion.

defense before trial. *Spirko*, 368 F3d at 611 ("It is undisputed that Spirko's defense counsel stipulated prior to trial that they had received from the state memoranda of interviews of [the witness] . . . ."). Thus, the court found there was no *Brady* violation. Here, no such disclosure occurred. Judge Sindt found the phone call occurred and there "is no dispute it was not disclosed." Trial Court Opinion at 4; App. B.

The prosecution next opts to trivialize the danger of calling an unfavorable witness, stating, "it may have been unpleasant or difficult for Swain to enlist Book's support." Response at 16. This contention ignores the record indicating that, while Book would know the truth of Ms. Swain's innocence, Ms. Swain had legitimate reasons to think that, if she subpoenaed him, he would hurt her case. This belief was reinforced by the fact that when Ms. Swain's father went to Book's home and attempted to speak with him, Book rebuffed him. EH 12/20/2011 at 71. It would be unreasonable to absolutely require the defense to subpoena witnesses it has investigated and deemed to be extremely hostile, even where the defense lacks any basis by which to ensure that the witness would be favorable.

However, defense counsel would have had a basis to call Book if critical information had not been withheld. The prosecution knew that Book, despite his open hostility and his outright refusal to even talk to Ms. Swain or her agents at the time of trial, actually was still willing to tell the truth about her innocence. Had the defense known about the exculpatory interview he gave to Picketts, trial counsel would have subpoenaed Book and put him on the stand, no matter how much he might hate Ms. Swain. EH 04/26/2012 at 9, 11. If the exculpatory interview had been disclosed, the defense would have had an important safety net even if Book wavered: he could easily have been impeached with his prior statement to Picketts.

Finally, the prosecution argues that, assuming Book were to testify upon retrial, his testimony would be cumulative and therefore would not make a different result probable. In

support of its argument, the prosecution points to the fact that Steven Way, who dated and lived with Ms. Swain prior to Dennis Book, testified that he never witnessed any sexual abuse at the home. Response at 17. This argument omits an essential distinction between the two witnesses. On cross-examination, Way admitted that he generally left the house for work before everyone else in the mornings. Trial Tr. Aug. 14, 2002, Vol. II 160–61. **Book, on the other hand, testified that he could not recall ever leaving the trailer before the children left for the bus**, because he wanted to spend time with Ms. Swain before he left for work. EH 12/20/2011 at 63. Ronnie corroborated this testimony, stating that Book was around "like every day" and would be "right there in the living room" in the mornings while the boys were getting ready for school. *Id* at 91, 96–97. This means that Book's testimony is substantially more exculpatory than the account of Way, and is anything but cumulative.

As Judge Sindt noted:

> It is important to note that Ronnie Swain testified that the Defendant sexually abused him daily on school days while living at the residence in the mornings before he was picked up by the school bus . . . not only is [Book's] testimony direct evidence of the Defendant's innocence, it is also evidence which attacks the credibility of Ronnie Swain.

Trial Court Opinion at 4 (emphasis in original); App. B. At trial, Ronnie testified that the abuse happened *every single weekday*. Trial Tr. Aug. 13, 2002, Vol. II 159, 167–68. Testimony that proves no abuse could have occurred on the vast majority of those days, even if it does not cover every single one, destroys Ronnie's original (and now recanted) story, and the prosecution's entire theory of the case. Book's testimony is therefore significantly different from that of Way and, as Judge Sindt correctly determined, would make a different result probable on retrial.

III. The Prosecution Misconstrues Ms. Swain's Actual Innocence Argument.

In noting that the U.S. Supreme Court has not yet resolved the question whether a habeas petitioner may be entitled to relief based on a freestanding innocence claim, the prosecution

dodges the question in this case. Ms. Swain does not argue that *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993) requires this Court to grant her relief based on her actual innocence. Rather, she invites this Court to resolve a question it has expressed interest in on several previous occasions: that of the status and proper treatment of actual innocence claims in Michigan. See, e.g., *People v Garrett* 493 Mich 949; 828 NW2d 26 (2013); *People v Swain*, 485 Mich 997; 775 NW2d 147 (2009). As detailed in Part IV of Ms. Swain's Leave Application, this Court should consider actual innocence under *Schlup v Delo*, *Herrera v Collins*, the Michigan Constitution, or MCL 770.1.

IV. The Prosecution Has Not Responded to Ms. Swain's Argument that the 60-Day Time Limit in MCL 770.2(1) Does Not Apply to Her Case.

MCL 770.1 expressly authorizes a trial court to grant a new trial when it determines that justice has not been done, and nowhere does it limit that authority to cases appealable as of right. While MCR 6.431 and MCR 6.500 *et seq.* provide the *procedural* framework for new trials and post-appeal relief, respectively, they do not supersede MCL 770.1, a substantive statute passed by the state legislature. The right of courts to act under MCL 770.1 *in addition to* the court rules is well recognized.[5] The holding that Ms. Swain's claim is time-barred, Court of Appeals Opinion at 7; App. A, is therefore incorrect. MCL 770.2(1) provides that: "[I]n cases **appealable as of right** to the court of appeals, a motion for a new trial shall be made within 60 days after entry of the judgment . . . ." (Emphasis added). Because Ms. Swain's case is not appealable as of right, her MCL 770.1 claim is not time-barred.

[5] See, e.g., *People v Lemmon*, 456 Mich 625, 634-35; 576 NW2d 129 (1998) (citing both MCL 770.1 and MCR 6.431 in granting motion for a new trial).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Ms. Swain respectfully requests that this Court:

1. Grant this application for leave to appeal to address the important questions presented here, or

2. Summarily reverse the Court of Appeals decision and remand this case to the trial court for a new trial.

Respectfully Submitted,

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